IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Bajrang Lal vs. Kanhaiya Lal & ors.

S.B. Civil Misc. Appeal No.1334/2006 against the Judgment dated 22.8.2006 passed by the learned District Judge, Bikaner in Election Petition No.259/2005.

Date of Judgment: December 14th, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. N.S. Acharya, for the appellant.

Mr. Vikas Balia)
Mr. D.D. Chitlangi) for the respondents.
Mr. K.K. Bissa)

BY THE COURT:

REPORTABLE

Heard learned counsel for the parties.

This appeal is under Section 46 of the Rajasthan Municipalities Act, 1959 (for short 'the Act of 1959' hereinafter) against the judgment of the trial court dated 22.8.2005 passed in Election Petition No.259/2005.

The election petitioners-respondents Kanhaiya Lal and Suresh Kumar submitted election petition under Section 34 read with Section 40 of the Act of 1959 to challenge the appellant-Bajrang Lal's election as Member of the Municipal Council, Nokha for Ward No.21 on the ground that the appellant Bajranglal non-petitioner no.4 before the court below was disqualified for being chosen as Member of the Municipal Council under sub-section (i-b) of Section 26 of the Act of 1959. The disqualification for being chosen as Member of the Municipal Council under sub-section (i-b) of Section 26 is that if a person is accused in criminal case and in which cognizance of the offence has been taken and the court has framed the charges against him of any offence punishable with imprisonment for five years or more. According to the allegations in the election petition, the appellant no.1-non-petitioner was facing trial of a Criminal Case No.171/2004 under Section 3/7 of the Essential Commodities Act, 1955 (for short 'the Act of 1955' hereinafter) and the court has already taken cognizance of the offence against the appellant accused and also framed the charges against him and according to the election petitioner respondent, the offence for which cognizance has been taken by the court against the appellant non-petitioner, was punishable with imprisonment for more than five years. The election petitioner respondent

submitted written objection before the Returning Officer at the time of scrutiny of the nomination paper but that objection was rejected by the Returning Officer by brief order, copy of which has been place on record by the election petitioner as Ex.1 (dated 6.8.2005). The Returning Officer took note of the allegation that the election petitioner Kanhaiya Lal submitted that the appellant Barjrang Lal is accused in criminal case under Section 3/7 of the Act of 1955 and wherein punishment provided is upto seven years' imprisonment and the court has already taken cognizance of the offence against the candidate Bajrang Lal. The Returning Officer sought guidance from the Election Commissioner but the Election Commissioner directed the Returning Officer to decide the objection in accordance with law at his own level. The Returning Officer rejected the objection simply on the ground that as per the provisions of Section 3 read with Section 7 of the Act of 1955, the punishment provided is from imprisonment of from three months to seven years, whereas as per sub-section (1-b) of Section 26 of the Act of 1959, a person is disqualified to contest the election in case he is facing trial of offence having punishment of imprisonment for five years or more and since the trial is going on, therefore, at this stage, it cannot be presumed that in case of conviction of the appellant, how much punishment will be given to the

appellant, as under Section 3/7 of the Act of 1955, the court can punish the accused with imprisonment from three months to seven years.

Before the court below, the appellant elected candidate submitted reply to the allegations. The appellant submitted that under the provisions of Section 3 read with Section 7 of the Act of 1955, though the court has taken cognizance against him and has also framed the charge under Section 3/7 of the Act of 1955 but the charge is not clear. It is submitted that under different provisions of Section 3 read with Section 7, there are different punishments ranging from punishment from imprisonment for 3 months to 5 years. In sum of the provisions, the punishment provided is less than five years, therefore, the Returning Officer rightly did not reject the appellant's nomination paper. It is also submitted in para 3 of the reply that since there was some doubt for the punishment which could have been awarded to the appellant and since the criminal case was pending, therefore, the appellant was not disqualified to contest the election. The appellant-non-petitioner also submitted that there was no political influence over the Returning Officer and the Returning Officer accepted the candidature of the appellant on the basis of principle of natural justice and the procedure has not affected the election result.

It is also submitted by the appellant returned candidate that the non-applicant no.2 has been impleaded as party in the election petition by name and the Returning Officer has not been impleaded as party, therefore, also the election petition is not maintainable.

Apart from contesting the election petition on merits, the appellant-non-petitioner submitted objection in writing before the court below and submitted that the applicants Kanhaiya Lal and Suresh Kumar have not deposited the security for the cost of the election petition as required under Section 53(1) of the Act of 1959. It is also submitted that the election petitioners have not signed the application dated 30.8.2005 by which permission was sought from the court for depositing the security amount. The applicants also did not sign the tender form for depositing the cost security under Section 53(1) of the Act of 1959. It is also alleged that on 30.8.2005, Shri G.K. Bajaj, Advocate, who deposited the security amount, was not competent person to deposit the cost security amount on behalf of the applicants because of the reason that Shri G.K. Bajaj was not the Advocate engaged by the election petitioners as the said advocate did not sign the Vakalatnama of the applicants. In sum and substance, firstly, the cost

security amount under Section 53(1) has not been deposited by the applicants themselves, secondly, the application for seeking permission to deposit the cost security amount has not been signed by the applicants, therefore, the deposit of security was not of applicants, thirdly, they did not sign the tender challan and fourthly, the amount deposited with signature of Shri G.K. Bajaj on 30.8.2005 is no valid deposit under Section 53(1) of the Act of 1959 as Shri G.K. Bajaj was not authorised to make deposit of cost security for the petition under Section 53(1) of the Act of 1959.

Elaborating the objections, learned counsel for the appellant submitted that Section 53(1) of the Act of 1959 is very clear and it clearly provides that a person filing election petition shall enclose with petition the government treasury receipt showing that a deposit of Rs.200/- in case of city and Rs.100/- in case of any other Municipality, has been made "by him" in government treasury in favour of the Judge as security for the costs of the petition. The emphasis of the learned counsel for the appellant is on the words "by him" used in Section 53(1) of the Act of 1959. According to the learned counsel for the appellant, the election law is required to be construed strictly and the compliance of the provisions of Election Law is

mandatory and required strict proof of its compliance. According to him when under sub-section (1) of Section 53, it has been provided that the security for the cost is required to be deposited “by him”, then it is required to be deposited by the person, who wishes to file the election petition to challenge the election and no other person can deposit the security for the cost of the petition on behalf of the election petitioner. In the alternative, it is also submitted that even if it is held that any authorised person can deposit the security for the cost of the petition on behalf of the election petitioner, then in the present case, there is no proof on record that Shri G.K. Bajaj, Advocate, has been authorised by the election petitioners for depositing the security for the cost of the election petition. It is also submitted that on 30.8.2005 or even on 31.8.2005, the learned counsel Shri G.K.Bajaj was not given any Vakalatnama by the election petitioners and there is no other authority shown by the petitioners authorising Shri G.K. Bajaj to deposit the security of the cost of the election petition. It is submitted that the compliance of Section 53(1) is mandatory and consequence of non-compliance is provided under sub-section (2) of Section 53 of the Act of 1959 which provides that if the petitioner fails to deposit the security for the cost of the election petition, the court shall dismiss the

election petition. The learned counsel for the appellant vehemently submitted that when the consequence is provided by the statute itself for non-compliance of the mandatory provisions, the court has no option but to dismiss the election petition for non-compliance. It is submitted that right to challenge the election is a right given by the statute and not a general civil right and, therefore, the procedure provided for the general law may be directory in nature in given facts and circumstances but here in this case, firstly, it is a controversy in relation to the election dispute where the strict compliance of law is necessary and secondly, the provisions by its nature of pre-deposit of security for the cost of the election petition is mandatory and thirdly the consequence of non-compliance is only dismissal of the petition. The learned counsel for the appellant relied upon the judgment Charan Lal Sahu v. Nandkishore Bhatt & ors. (ELR(53) 284) as well as judgments of the Hon'ble Apex Court delivered in the cases of Aeltemesh Rein v. Chandulal Chandrakar and others (AIR 1981 SC 1199) and Uday Shaner Triyar v. Ram Kalewar Prasad Singh and anr. (AIR 2006 SC 269).

On merits, the learned counsel for the appellant submitted that the court below has committed serious error of law in holding that the appellant was

disqualified for being chosen as Member of the Board under Section 26(1-b) of the Act of 1959. The learned counsel for the appellant vehemently submitted that it is is a case of no evidence and that the election petitioner did not appear in the witness box nor produced any evidence to prove their case against the appellant. It is also submitted that the election petitioner failed to plead sufficient material facts constituting any cause of action for getting the appellant declared disqualified under Section 26(1-b) of the Act of 1959. It is submitted that the allegation is absolutely vague and further it is clear from the charge framed against the appellant in the criminal case that the court has not mentioned which of the order passed by any competent authority under Section 3 of the Act of 1955, has been violated by the appellant-non-petitioner returned candidate. Under Section 3 of the Act of 1955, there are several clauses which empowers the Central Government to issue orders for control production, supply, distribution etc. Of essential commodities. The petitioners failed to produce any order of the Central Government, apart from the fact that he has not pleaded which of the order passed under Section 3 of the Act of 1955 has been violated by the appellant-non-petitioner. In absence of that it cannot be held that the appellant is facing trial of any offence for which punishment provided is

for more than five years.

Learned counsel for the appellant further submitted that Section 3 of the Act of 1955 itself is not a provision making any act or omission punishable but it provides that the Central Government may issue orders and violation thereof may be offence punishable with imprisonment. Therefore, mere mention of Section 3 read with Section 7 in the order taking cognizance and in the charge framed against the appellant, cannot be said to be violation of any of the order of the Central Government, passed under Section 3 of the Act of 1955. It is also submitted that Section 7 provides for punishment (penalties) in case any person contravenes any order made under Section 3. Here in this case, as submitted earlier, the election petitioners failed to produce any order made under Section 3, therefore, there cannot be any application of Section 7 of the Act of 1955. Learned counsel for the appellant further vehemently submitted that it is clear from the entire reading of Section 7 that it provides even punishment of one year only under sub-clause (i) of clause(a) of sub-section (1) of Section 7. Therefore, the election petitioners failed to prove that the court has taken cognizance of any offence against the appellant for contravention of any order passed under Section 3 of the Act of 1955 having only punishment for more than five years imprisonment.

It is also submitted that it was the duty of the election petitioners to specifically level allegations constituting cause for filing the election petition but in this case, not only the election petitioners have not specified how the appellant can be punished for more than five years' imprisonment by the criminal court but despite objection raised in reply to the election petition by the appellant-non-petitioner, the election petitioners did not produce any evidence nor produced any document or order of the competent authority, which according to the election petitioners has been violated by the appellant. The learned counsel for the appellant vehemently submitted that the court cannot presume existence of any order under Section 3 of the Act of 1955 nor any order can be used against the appellant which has not been even shown to the appellant by the election petitioners.

Learned counsel for the appellant vehemently submitted that it is settled law that in case where both the parties failed to lead evidence, the only course open for the court is to dismiss the petition. The learned counsel for the appellant relied upon the judgment of the Hon'ble Apex Court delivered in the case of Laxman Siddapa Naik v. Kattimani Chandappa Jampanna & Ors. reported in AIR 1968 SC 929 and the judgment of this Court delivered in the case of Smt.

Tara Devi v. Smt. Sudesh Chaudhary reported in 1997[2] RLR 141. It is also submitted that when plea is not specific about the alleged allegation of taking cognizance of offence having punishment of more than five years against the appellant then no evidence can be looked into to prove the said fact. However, at the cost of repetition, the learned counsel for the appellant vehemently submitted that there is no evidence as well as pleading in the present case about the disqualification of the appellant.

Learned counsel for the appellant also feebly submitted that the Returning Officer has not been impleaded as party by designation and has been impleaded by name because of the personal allegations against the Returning Officer.

Learned counsel for the respondents submitted that the facts, particularly of court's taking cognizance and framing of charge against the appellant, are not in dispute and, therefore, there was no need to produce any evidence by the appellant. It is submitted that the respondents/election petitioners are not relying upon the weakness of the defence of the defendant- appellant but have proved the fact by positive evidence and from the admitted documents. It is submitted that so far as the objection raised by the appellant on the ground of non-compliance of deposit of security for cost of

petition is concerned, it is wholly untenable and not supported by any law. The learned counsel for the respondents vehemently submitted that the words “by him” mentioned in sub-section (1) of Section 53 of the Act of 1959 cannot be read to mean that the security for the cost of the petition can be deposited only by the election petitioner himself personally. It is also submitted that it is also not provided under the Act of 1959 that there must be authorization in writing by the election petitioners authorizing the person to deposit the security for the cost of the election petition. It is submitted that the compliance of Section 53(1) can be made by the election petitioners by depositing security for the cost of the election petition either himself or through any of his person irrespective of fact whether any written authority has been given or not. It is also submitted that there is no provision of dismissal of the election petition in case of non-compliance of sub-section (1) of Section 53, whereas the Legislature knowingly and cautiously provided under sub-section (2) of Section 53 that in case during course of the trial of an election petition, the Judge may at any time can call upon a petitioner to give such further security for costs and in case that order is not complied with by the petitioner, the court may dismiss the petition. It is also submitted that the Legislature cautiously has not provided such

consequence in sub-section (1) of Section 53. Even under Section 53(2), it is not mandatory that the court shall dismiss the election petition as it provides that the court may dismiss the election petition in case of non-compliance of order passed by the court under Section 53(2) of the Act of 1959.

Apart from above, according to the learned counsel for the respondents, it may be gathered from the totality of the facts and the circumstances whether the petitioner has deposited the security for the cost of the election petition or not. It is vehemently submitted that the Vakalatnama is not a condition precedent for giving authority to the Advocate to deposit the security amount for the costs of the petition under Section 53. The learned counsel for the respondents pointed out that how the election petition can be presented, is provided under Section 36 of the Act of 1959 and as per Explanation-2 under Section 36, an election petition can be presented by the election petitioner himself or “by a person authorised in writing in this behalf by the person making the petition”. It is submitted that under Section 53(1) or even under sub-section (2) of Section 53, it has not been provided that the deposit is required to be made by a person authorised in writing by the election petitioner.

Learned counsel for the respondents relied upon

the Division Bench Judgment of the Madhya Pradesh High Court delivered in the case of Kesheoprasad Hariharprasad vs. A.D. Mani and others reported in 1961 MPLJ 1021 wherein the fact in issue was whether the deposit made by the counsel for the petitioner mentioning it for security for election petition is sufficient compliance of Section 117 of the Representation of People Act, which is the provision pari materia to Section 53(1) of the Act of 1959 and the same words “by him” have been used under Section 117. The Division Bench of the Madhya Pradesh High Court held that “the said requisite deposit can be made by any person directed by the election petitioner to pay the amount. All that is necessary it to indicate clearly that the deposit is from the person filing the election petition.”

The learned counsel for the respondents further submitted that Hon'ble the Apex Court in the case of Uday Shanker Triyar v. Ram Kalewar Prasad Singh and anr. reported in AIR 2006 SC 269 clearly held that the procedural provision should not be allowed to defeat the substantive rights or to cause injustice. In the said case, Hon'ble the Apex Court even after holding that the requirement that the appeal should be signed by the appellant or his pleader (duly authorized by a Vakalatnama executed by the appellant) is no doubt, mandatory. But it does not mean that non-compliance

should result in automatic rejection of the appeal without an opportunity to the appellant to rectify the defect. Hon'ble the Apex Court further held that if and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the Vakalatnama. The Hon'ble Apex Court also in the above case noticed that the Registry should properly check and verify the Vakalatnama. Advancing the argument further, the learned counsel for the respondents submitted that Hon'ble the Apex Court in the case of Chandrakant Uttam Chodankar v. Dayanand Rayu Mandrakar reported in (2005) 2 SCC 188, after considering several earlier decisions of the Hon'ble Apex Court in the matter of election law, clearly held that it is sufficient if the procedural law has been complied with substantially.

On the main issue, learned counsel for the respondents submitted that the person incurs disqualification immediately when the competent court of law takes cognizance of offence and frames charge against the person of any offence punishable with imprisonment for five years or more. The requirement of law under Section 26(i-b) of the Act of 1959 is (i) taking cognizance of the offence, (ii) framing of charge against the person, (iii) of any offence

punishable with imprisonment for five years or more. It is absolutely irrelevant whether trial is going on in the criminal case or ultimately that person is acquitted. The Full Bench of this Court finally decided that persons suffers with the disqualification immediately when cognizance is taken of the offence, by the competent court of law and charge is framed against him of any offence punishable with imprisonment of five years or more. The Returning Officer or the court in the election petition need not to and cannot look into the legality, validity and correctness of the order of taking cognizance or framing of the charge. In the election petition, the civil court cannot even see whether there was sufficient material before the criminal court for taking cognizance of the offence or the charge has been framed by the criminal court on the basis of some material or not. It is submitted that as per sub-section (i-b) of Section 26 of the Act of 1959, even it is not necessary that there should be minimum sentence of imprisonment for five years. Even in a case imprisonment can extend to five years or beyond, the person is disqualified to contest the election. Therefore, according to the learned counsel for the respondents, from the admitted documents Ex.3 and Ex.2, it is clear that in criminal case the competent court took cognizance of the offence under Section 3/7 of the Act of 1955 and the charge has been framed against the

appellant under Section 3/7 of the Act of 1955.

It is submitted that from bare reading of the charge it is clear that the charge against the appellant in criminal case is that he stored 58 litres. of the essential commodity Kerosene which was meant only for the distribution through public distribution system and was meant for the persons holding the Ration Cards and the appellant was found using the said commodity for his business purposes and the appellant had no valid licence to store the said essential commodity. The appellant also placed on record the certified copy of the order-sheet of the Criminal Case No.171/2004 as Ex.3 whereby the court took cognizance of offence under Section 3/7 by order dated 5.8.2004. These documents are admitted documents as admitted by the appellant. The learned counsel for the respondents submitted that the competent court, after taking cognizance of the offence, framed the charge and, therefore, by mere reading of the charge Ex.A.2, it is clear that the offence committed by the appellant is covered only by sub-clause (ii) of clause (a) of sub-section (1) of Section 7 of the Act of 1955. From the language of charge, the application of sub-clause(i) of clause (a) of sub-section(1) of Section 7 stands excluded.

According to the learned counsel for the respondents, the appellant virtually is challenging the order of framing charge on the ground of vagueness and the election tribunal has no jurisdiction to declare the charge vague. The learned counsel for the respondents further submitted that the contention of the appellant that the charge is vague or is not sufficient for punishing the appellant for five years or more, is factually wrong. The learned counsel for the respondents also submitted that it is wrong to contend that in case where person can be convicted for less than five years' imprisonment by the court, then the person is not disqualified to contest the election. It is submitted that where the person can be convicted and sentenced to imprisonment for more than five years, he incurs disqualification to contest the election irrespective of fact whether the court has discretion to sentence him for less than five year's imprisonment.

I have considered the submissions of learned counsel for the parties.

Learned counsel for the appellant was right in submitting that the election laws are required to be construed strictly but in the opinion of the Court not only for the purpose of rejecting the election petition on the ground of formal defects or non-compliance of

certain ancillary provisions of law. Election law is required to be construed strictly and to achieve the object for which the elections laws are enacted. Election laws are enacted not only for the purpose of free and fair election but for the purpose that only eligible candidates should be permitted to hold the elected posts. The law is required to be construed strictly to achieve the object that no ineligible candidates should be elected and if elected should not continue to hold the post as the faith in the process of election can remain only if the eligible candidates are allowed to hold the post. It is true that the majority vote elects the candidates but election of ineligible candidate by majority vote cannot make the ineligible candidate eligible. If an ineligible candidate is able to secure majority vote in election even then on finding proof of his ineligibility under the law governing the elections, he can be removed in accordance with law. Ineligible candidate cannot and should not be permitted to continue on the post.

More emphasis of the appellant is for rejection of the election petition on the ground that the election petitioner failed to comply with the statutory requirements of making payment of security deposit for the cost of the petition as required by Section 53(1) of the Act of 1959. It will be worthwhile to look into

Sections 53(1) and 53(2) of the Act of 1959 which are as under :-

> "53. Security for costs. - (1) A person filing an election petition shall enclose with the petition a Government treasury receipt showing that a deposit of two hundred rupees in the case of a city or of one hundred rupees in the case of any other municipality has been made by him in a Government treasury in favour of the Judge as security for the costs of the petition.
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> (2) During the course of the trial of an election petition, the Judge may at any time call upon a petitioner to give such further security for costs as he may direct and may, if the petitioner fails to do so, dismiss the petition."

According to the appellant, the amount required to be deposited under the above provision of security can be deposited only by the election petitioner himself and not by any other person not even through his authorised agent. Therefore, two questions arise (1) whether the deposit under Section 53(1) can be made only by the election petitioner himself or it can be through any person on behalf of the election petitioner? and (ii) Whether the condition of deposit of said amount by election petitioner himself is

mandatory condition and if the said amount is not deposited by the election petitioner “himself”, the election petition is liable to be rejected only on this ground ?

Learned counsel for the appellant with the help of the decision of the Hon'ble Apex Court delivered in the case of Aeltemesh Rein vs. Chandulal Chandrakar and others reported in AIR 1981 SC 1199, submitted that in identical provision of law i.e., under the Representation of People Act, 1951 (for short 'the Act of 1951'), there is a provision for payment of security deposit by the election petitioner and the Hon'ble Apex Court in the above judgment held that the requirement of deposit of amount is mandatory and in case, required deposit is not made by the election petitioner, the election petition is liable to be dismissed.

So far as the proposition that the requirement of deposit of security amount for election petition is mandatory is concerned, there is no dispute. In the case of Aeltemesh Rein (supra), the security amount was not deposited was the admitted case of the election petitioner whereas in the present case, the security amount was deposited for the election petition and the dispute is with respect to the validity of the deposit. The dispute with respect to the validity of the deposit

was not issue in the case of Aeltemesh Rein (supra). Therefore, the case of Aeltemesh Rein (supra) is the only authority laying down that the requirement of payment of security deposit by the election petitioner is mandatory.

Contention of learned counsel for the appellant is that the words “by him” used in Section 53(1) of the Act of 1959 cannot be interpreted to mean “by his authorised agent” or “by anybody on behalf of the election petitioner”. The words “by him” is very clearly mentioned in Section 53(1) and consequence has been provided in Section 53(2) which says that the Court shall dismiss the election petition. The question of invalidity in deposit of security amount came up for consideration before the Hon'ble Apex Court in the case of K. Kamaraja Nadar vs. Kunju Thevar and others reported in AIR 1958 SC 687. In K. Kamaraja's case (supra), one of the instance about validity of security deposit in the election petition considered was that the security deposit had not been made in the name of “Secretary, Election Commission”. According to the respondent in that case, opposing the election petition, it was violation of the clear and mandatory provisions of Section 117 of the Act of 1951. The judgment of the Hon'ble Apex Court in K. Kamaraja's case (supra) is helpful in interpreting Sections 53(1)

and 53(2) of the Act of 1959. The Hon'ble Apex Court clearly observed that what is of the essence of the provision contained in Section 117 is that the petitioner should furnish security for the cost of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of Rs.1000/- (as required in that case) has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under the control and payable on a proper application being made in that behalf to the Election Commission or any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or any one else. In the light of the above decision of the Hon'ble Apex Court, the same principle can be applied other way round with respect to the security deposit for the cost of election petition under Section 53(1) of the Act of 1959 i.e. On the question who can deposit the security amount for election petition and how it may be deposited. The mandatory requirement is of deposit of security for the cost of petition and reaching it to the control of the judge hearing the election petition who can pass appropriate order with respect to said security deposit as per law. The words “by him” used in Section 53(1) cannot be interpreted in contradiction to the legal

right of the election petitioner which empower to act through others because no such restriction has been put by any provision in the Act of 1994. If agent acts on behalf of the other person, than the act of agent is not of agent himself unless character of act makes it clear that the act was done by the agent not for the principle or unless it is proved that the principle has not authorised the agent to act for that particular purpose. Learned counsel for the appellant could not point out how an act done by the agent is not act of the principle.

K. Kamaraja's case (supra) was again considered by the Hon'ble Apex Court in the case of Chandrika Prasad Tripathi vs. Shiv Prasad Chanpuria and others reported in AIR 1959 SC 827 and the Hon'ble Apex Court has approved the view taken in K. Kamaraja's case (supra) and held that Section 117 of the Act of 1951 should not be strictly or technically construed and wherever it is shown that there has been substantial compliance with its requirements, the Tribunal should not dismiss the election petition on technical grounds. In both the cases i.e. in K. Kamaraja's case (supra) and in Chandrika Prasad Tripathi's case (supra), the security amount was deposited as required by law to maintain the election petition but there were defects in the deposit and in Chandrika Prasad Tripathi's case (supra), even an objection was raised that though the election

petitioner deposited the security amount in the name of “Secretary to the Election Commission” as required by Section 117 of the Representation of Peoples Act, 1951 but the deposit was with condition that said amount will be refundable as per order of Election Commission of India and according to the respondent opposing the election petition, the Election Commission of India had only power to order refund of the security amount to the election petitioner. Meaning thereby, according to the said respondents, it would not be competent to the Election Commission to direct the amount to be paid to the appellant opposing the election petition even if the election petition filed by the respondent/election petitioner is dismissed with costs. Even the said objection was rejected by the Hon'ble Apex Court holding that the said objection is purely technical.

Section 117 of the Act of 1951 again came up for consideration before the Madhya Pradesh High Court in the case of Kesheoprasad Hariharprasad vs. A.D. Mani and others reported in 1961 MPLJ 1021 and the Division Bench of Madhya Pradesh High Court considered the same word “himself” used in Section 117 for deposit of security amount by the election petitioner which was rejected by the Division Bench after relying upon the judgments of the Hon'ble Apex Court delivered in K. Kamaraja's case (supra) and Chandrika Prasad Tripathi's

case (supra) respectively and the Division Bench held that if there is a substantial compliance of requirement of deposit of security amount, the election petition cannot be dismissed and clearly held that the amount can be paid by the person making the deposit himself or for the matter of that, by any person directed by him to pay the amount and all that is necessary is to indicate clearly that the deposit is from the person filing the election petition.

In view of the above pronouncements also, it is clear that the mandatory requirement of Section 53(1) is only to the extent that for maintaining the election petition, security deposit is required to be deposited by the election petitioner and it should reach to the control of the judge hearing the election petition so that he can pass appropriate order of payment of cost to the non-applicant in case, the election petition is dismissed and the words “by him” as used in Section 53 (1) cannot be given narrow interpretation as given by learned counsel for the appellant. The security amount under Section 53 of the Act of 1959 can be deposited by any person authorised by the election petitioner.

In the light of the above legal position, if we again look into the facts of the case, it is clear that the election petition was submitted on 31.8.2005 and it

appears that before that on 30.8.2005, an application was submitted before the court below under Section 53 of the Act of 1959 with the signature of Shri G.K.Bajaj, Advocate and an order was passed by the court on the same application itself on 30.8.2005 itself allowing Shri G.K.Bajaj to deposit the security amount under Section 53 of the Act of 1959 for election petition having title Kanhaiya Lal and Suresh Kumar vs. Bajrag Lal Gattani and Returning Officer. It appears from the record that the Government cash challan (tender) was submitted before the trial court under the signature of learned counsel Shri G.K.Bajaj, signed on 30.8.2005. In the cash challan (tender) under the column “Name of party and on whose behalf the money is tender”, names of Kanhaiya Lal and Suresh Kumar sons of Shri Laxmi Narayan caste Karwa r/o Ward No.21, Nokha are mentioned. In the cash challan (tender) receipt under column “Name of parties and No. Of their suit”, it is written- Kanhaiya Lal and Suresh Kumar vs. Bajrang Lal Gattani and Smt. Priyanka Goswami, Nirwachan Adhikari, Nokha. Under the column “Nature of payment”, it is mentioned that amount is being deposited for filing election petition as security cost Rs.100/- under Section 53 of the Rajasthan Municipalities Act in the account of District Judge. On this receipt there is signature of Munsarim of the District Court, Bikaner with order that the amount may

be deposited. The above government cash challan(tender) receipt affixed on plain paper with signature of Shri G.K.Bajaj, has been annexed with the election petition submitted on 31.8.2005. On 31.8.2005, the Munsarim recorded the date of presentation as 31.8.2005 and name of the presenting person Shri G.K. Bajaj, Advocate and fixed the next date 1.9.205. On 31.8.2005 itself the office of the court of the District Judge reported that the security amount for cost Rs.100/- has been deposited. The election petition which was presented on 31.8.2005 contains the signature of both the petitioners as well as learned counsel Shri G.K.Bajaj. On 1.9.2005, the court perused the office report and registered the election petition and directed to issue notice to the non-petitioner appellant and respondent no.2.

Therefore, from the facts mentioned above, it is apparently clear that the amount was deposited for maintaining the election petition of the election petitioners - Kanhaiya Lal and Suresh Kumar to challenge the relevant election of the appellant and it was deposited for the purpose of cost of security for the election petition in the account of the Court. Neither the learned Judge nor his office pointed out any defect in either application or in cash challan/ tender form. The same learned Advocate submitted

election petition which is clear from the report of the Munsarim made on the election petition. The same learned Advocate submitted the cash challan (tender receipt) in the court along with election petition with his signature and it is clear from the cash challan that the amount reached to the control of the learned District Judge and he had power to pass appropriate order for payment of security amount as per law under the Act of 1959 in case of dismissal of the election petition or allowing the election petition, as the case may be.

Section 53 of the Act of 1959 requires deposit of security amount by the election petitioner which has been interpreted to mean that the security deposit can be made by the election petitioner himself or through any person. For the purpose of giving authority to act in the present situation cannot be construed to mean only written authority. The overall circumstances clearly proved that the election petitioner authorised learned advocate to act on his behalf for the purpose of depositing the security amount under Section 53(1) of the Act of 1959, then that deposit cannot be said to be invalid for want of written authority and particularly neither the court's office nor the court raised any objection on the ground of authority of learned counsel on behalf of his client and who on the

next day, only submitted election petition and the vakalatnama of election petitioners in the court. The authority for deposit of the security amount by the election petitioner may be written or oral and can be proved from circumstances leading to deposit of the security amount and circumstance thereafter. It cannot be presumed that an Advocate will submit application for seeking permission to deposit under Section 53 of the Act of 1959 in the Court and obtain permission and will deposit the amount from his own pocket and subsequently, submit the election petition on behalf of same applicant and annex the tender receipt in proof of deposit of security amount as required under Section 53 of the Act of 1959. All throughout, from seeking permission for deposit of the amount of security under Section 53 of the Act of 1959 and submitting of election petition and conducting the election petition was done by the same Advocate which clearly shows that the applicants/respondents duly authorised learned Advocate to act on their behalf for the purpose of depositing the security amount under Section 53(1) of the Act of 1959.

Learned counsel for the respondents pointed out that the requirement of authorisation in writing is provided only for presentation of the election petition by any person other than the election petitioner

himself as per the Explanation 2 to Section 36 of the Act of 1959 whereas under Section 53(1), no such provision has been made requiring written authorisation of the election petitioner for the purpose of deposit of security cost of the election petition. At this juncture, it will be worthwhile to mention here that the election petition is presented under Section 36 of the Act of 1959 and as per Section 53(1) of the Act of 1959, the election petitioner is required to enclose with the petition a Government treasury receipt showing that he has deposited the security for the cost of election petition. Therefore, security is required to be deposited before the election petition is filed and written authority is required only when the election petition is presented by the person authorised by the election petitioner. Therefore also, it will be in consonance with Section 36, if Section 53 of the Act of 1959 is read, that the security amount deposited even without written authority but with authority otherwise than written, that deposit is valid. Therefore, it is held that the requirement of deposit of security amount under Section 53(1) is mandatory condition. If there is a substantial compliance in the deposit of security amount, then election petition cannot be dismissed. For the purpose of deposit of security amount, it is not necessary that the election petitioner himself should deposit the security amount. The security amount on

behalf of the election petitioner can be deposited by any person on behalf of the election petitioner and for that purpose, even if there is no written authority, the circumstances can be looked into to find out whether the deposit made by the person depositing the security amount, was on behalf of the election petitioner or not ? In the present case, the security amount has been deposited by the Advocate of the election petitioners and with authority from the election petitioners though vakalatnama was not filed by learned counsel along with the application for deposit of security amount and he filed his vakalatnama along with the election petition and submitted the challan in proof of payment of security deposit on behalf of the election petitioners along with the election petitioners' election petition. Therefore, the deposit of the security amount was for the election petitioners and, therefore, the court below has not committed any error of fact or law in rejecting the objection of the appellants on this count.

On merits, it has been contended by learned counsel for the appellant that there is no pleading in the election petition that which of the order passed under Section 3 of Act of 1955 has been violated by the appellant. It is submitted that Section 3 of the Act of 1955 itself nowhere provides for restriction but it

empowers the competent authority to issue notification and violation of which is punishable under Section 7 of the Act of 1955. It is also submitted that even from the charge framed by the court below i.e. Ex.2, and the order of the cognizance dated 5.8.2004, it is not clear that for violation of which of the order under Section 3 of the Act of 1955, the Court has taken cognizance and framed charge. The various offences provide for different punishments and punishment in some of the offences is less than five years, therefore, no evidence can be looked into so as to prove that the cognizance was taken by the Court for the offence which is punishable for more than 5 years imprisonment. Not only this, but in fact, in evidence, the applicants/respondents failed to produce the order which is alleged to have been passed under Section 3 of the Act of 1955 and, therefore, this itself is doubtful whether any order was passed under Section 3 of the Act of 1955 by the competent authority and, therefore, there arises no question of violation of any order of the competent authority by the appellant.

The argument of learned counsel for the appellant appears to have been founded upon the assumption that the civil court, while deciding the election petition, can look into the legality and validity of the order taking cognizance passed in criminal case and the

election petitioner is required to produce the evidence to justify that the order of cognizance passed by the competent court of law was passed on the basis of evidence on record in criminal case. Further, the election petitioner is required to produce evidence to justify the order of cognizance and framing of charge. Contrary to it, the disqualification under Sub-Section (i-b) of Section 26 of the Act of 1959 is incurred by any person on taking cognizance by the Court against said person in criminal case where the punishment for offence is more than 5 years. Since the civil court has no jurisdiction to examine the legality and validity of the order taking cognizance by the criminal court, therefore, the civil court cannot look into the foundations on the basis of which the criminal court took cognizance of offence against the accused persons nor even the elected candidate can produce evidence to show that the order of cognizance is illegal. This view finds support from the Full Bench decision of this Court (in which I was also party to judgment) delivered in the case of Narayan Lal vs. State of Rajasthan & ors. reported in 2003(2) DNJ (Raj.) 661 (FB) wherein validity of identical provision of law i.e. Section 19 (gg) of the Rajasthan Panchayati Raj Act, 1994 was under consideration and the Division Bench's decisions given in the cases of (1) Shiv Ram & 5 Ors. vs. The State of Rajasthan and others reported in 2000(4) WLC

(Raj.) 412 and (2) Babu Lal vs. District Judge, Merta (S.B. Civil Writ Petition No.1185/2002) were considered and after examining the validity of identical provision to Sub-section (i-b) of Section 26 of the Act of 1959, the Full Bench held that subsequent acquittal of the accused person in criminal case is also irrelevant. Meaning thereby, what is to be seen is that on the relevant date, whether the candidate was facing trial in a criminal case and in the criminal case, cognizance has been taken against him and the cognizance has been taken for the offence providing punishment for more than five years. Therefore, when subsequent acquittal of the person in criminal case is not relevant which proves that the charge against the person was wrong, than judging the legality of charge other than court trying the criminal case or by the appellate court or revisional court in the same hierarchy is not permissible. The requirement of law under Section 26(i-b) is met fully on proving that the competent court took cognizance of offence and framed the charge and offence is punishable for five years imprisonment. The Division Bench of this Court in Shiv Ram Singh's case (supra) specifically held as under :-

> “Thus, after the charge is framed, the accused cannot be heard to say outside the trial that he has been falsely implicated for certain ulterior motives.”

This makes the legal position clear and the appellant cannot say outside the trial that he has been wrongly or illegally implicated in criminal case or there was no foundation or evidence for framing the charge.

In view of the above legal position, if the pleading of the applicant/respondent is looked into, then it is clear that the respondent clearly pleaded that the appellant is accused in a criminal case wherein cognizance has been taken by the Court under Section 3/7 of the Act of 1955 and the court has framed the charge against the appellant. He also pleaded that the punishment for the said offence is more than five years. What is offence for which charge has been framed by the Court against accused and what punishment is provided for the offence is to be seen from the charge and from the law providing punishment on conviction for the charge. It is more a question of law than evidence when order of taking cognizance and the charge are admitted facts.

Whether the offence was punishable for more than five years imprisonment, it will be worthwhile to quote the charge framed against the appellant, which is as under :-

"पहला- आपके विरूद्ध आरोप है कि आपने दिनांक 11-3-

2003 को बाद दोपहर करीब 4.45 पी.एम. पर आपकी फर्म मैसर्स गट्टाणी केमिकल एवं फूड प्रोडेक्ट बी-4-ए, रिको इण्डस्ट्रीयल ऐरिया, नोखा स्थित के कारखाना में भुजिया, पापड़ बनाने की दस भट्टियां मय ब्लोवर के लगा रखी थी, जिसमें से एक भट्टी चालू थी जिसका पाईप भण्डारण टंकी से जोड़ा हुआ था, जिसमें से तेल आ रहा था, भण्डारण टंकी को देखा तो उसमें नीले रंग का केरोसिन था, आपके भौतिक व संज्ञान कब्जा से 58 लीटर नीला केरोसिन जो सार्वजनिक वितरण प्रणाली द्वारा वितरित किया जाता है, मिला जो कि केवल राशनकार्ड धारियों द्वारा ही उपयोग में लिया जा सकता हैं का अनाधिकृत रूप से संग्रहण कर व्यवसायिक उपयोग में लिया जा रहा था, उक्त नीला केरोसिन से संग्रहण कब्जा बाबत आपके पास कोई वैध लाईसेंस अथवा परमिट नहीं था। इस प्रकार आपका उक्त कृत्य धारा 3/7 आवश्यक वस्तु अधिनियम के तहत दण्डनीय अपराध है जो कि मेरे प्रसंज्ञान में है।"

Section 7 of the Act of 1955 reads as under:-

"7. Penalties.- (1) If any person contravenes any order made under Section 3.-

(a) he shall be punishable.-

(i) in the case of any order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extent to one year and shall also be liable to fine,

and

(ii) in the case of any other order, with imprisonment for a term shall not be less than three months but which may extent to seven years and shall also be liable to fine:

(b) any property in respect of which the order has been contravened shall be forfeited to the Government:

(c) any packing, covering or receptacle in which the the property is found and any animal, vehicle, vessel or other conveyance used in carrying the property shall, if the court so orders, be forfeited to the Government.

(2) If any person to whom a direction is given under clause (b) of sub-section (4) of Section 3 fails to comply with the direction, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:

(2-A) If any person convicted of an offence under sub-clause (ii) of clause (a) of sub-section (1) or under sub-section(2) is again convicted of an offence under the same provision, he shall be punishable with imprisonment for the second and for every subsequent offence for a term which shall not be less than six months but which may extent to seven years and shall also be liable to fine:

(3) Where a person having been convicted of an offence under sub-section(1) is again convicted of an offence under that sub-section for contravention of an order in respect of an essential commodity, the Court by which such person is convicted shall, in addition to any penalty which may be imposed on him under that sub-section, by order, direct that that person shall not carry on any business in that essential commodity for such period, not being less than six months, as may be specified by the Court in the order."

The above charge, if read along with Section 7 and Section 3(2)(h) and (i) of the Act of 1955, then it is clear that the charge was not in relation to a case falling under Clause (h) or Clause (i) of Sub-section (2) of Section 3 of the Act of 1955 for which punishment is provided of one year. Clause (h) and Clause (i) of Sub-section (2) of Section 3 of the Act of 1955 read as under :-

"(h) <u>for collecting any information or statistics</u> with a view to regulating or prohibiting any of the aforesaid matters ;

(i) <u>for requiring persons</u> engaged in the production, supply or distribution of, or trade and commerce in, any essential commodity to maintain and produce <u>for inspection such books, accounts and records relating to their</u>

> business and to furnish such information relating thereto, as may be specified in the order ;"

Violation of all other orders passed under Section 3 of the Act of 1955 are punishable under Sub-clause (ii) of Clause (a) of Sub-section (1) of Section 7 of the Act of 1955 :-

> "7(1)(a)(ii) in the case of any other order, with imprisonment for a term shall not be less than three months but which may extent to seven years and shall also be liable to fine:"

The Court deciding the election petition is entitled to look into the order of cognizance and charge to find out what is the punishment provided for the offence in relevant law for which the cognizance has been taken in the criminal case and charge has been framed by the criminal court without questioning the correctness, legality and validity of the order of cognizance and charge. In view of the order-sheet dated 5.8.2004 (Ex.3) and copy of charge (Ex.2), it is fully proved that the appellant was accused in criminal case no.171/2004 registered under the Act of 1955, cognizance was taken by the Court against the appellant under Section 3/7 on 5.8.2004 and the charge fully

discloses that the punishment provided for offence for which the cognizance was taken and charge was framed by the criminal court, was for the offence for which imprisonment of more than 5 years has been provided by law.

In view of the above discussion, the judgments relied upon by learned counsel for the appellant delivered in cases of [1] Smt. Tara Devi vs. Smt. Sudesh Chaudhary reported in 1997(2) RLR 141 ; [2] Khagendra Lal Dutta & Anr. vs. Jacob Sole Jacob reported in 1995(2) Civil Court Cases 403 (S.C.) and [3] Laxman Siddappa Naik vs. Kattimani Chandappa Jampanna and others reported in AIR 1968 SC 929, have no application to the facts of the case and there is no dispute with respect to the proposition that the consequence of failing to prove the fact would be that the opposite party would not be required to produce evidence in rebuttal and the fact will have to be treated as not proved and the legal consequences would follow as held by the Division Bench of this Court in Tara Devi's case because of the reason that in the present case, the appellant fully proved the fact of taking cognizance by the competent court for the offence under Section 3/7 of the Act of 1955 against the appellant wherein the punishment provided is more than 5 years and the law laid down by the Hon'ble Apex

Court in Khagendra Lall's case (supra) is also well settled law and in the present case, the plea was specific in the pleading taken by the respondent in the election petition and it was made clear in the pleading that the election of the appellant is being challenged on the ground under Section 26(i-b) of the Act of 1959. It is not a case where the applicant did not lead evidence and, therefore, the election petition can be dismissed on the basis of the proposition that in a case where both the sides do not lead evidence, the matter must be decided on the basis of original onus which lies on the election petitioner and the election petitioner cannot succeed because of weakness of evidence of successful candidate. As stated above, the election petitioner not only led evidence in the form of documentary evidence but the evidence is admitted evidence by the non-applicant/appellant, successful candidate himself. The appellant admitted order of cognizance under Section 3/7 of Act of 1955 (Ex.3) and copy of charge Ex.2, therefore, it was not a case where there was any necessity of the election petitioner to give his statement in view of the admitted evidence on record with respect to taking cognizance of offence against the appellant and framing of charge and punishment provided for the offence as the election petitioners' evidence by word of mouth also could not have changed the order dated 5.8.2004 nor charge Ex.2.

It was a matter of drawing inference from the proved evidence. Therefore also, even in case, when the election petitioner's did not gave any oral statement in Court, then also, the Court below was fully justified in deciding the issue no.1 in favour of the respondent/election petitioners and against the appellant.

In view of the above discussion, the appeal of the appellant, having no merits, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya